LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
AUG 27 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 310

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT

CARL E. NEWTON
2 Wall Street
New York 5, New York

and

WILLIAM T. GRIFFIN
233 Broadway
New York 7, New York

Counsel for appellants Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company.

RICHARD SWAN BUELL
40 Wall Street
New York 5, New York

Counsel for appellant The New Jersey and New York Railroad Company, Horace Banta, Trustee.

OTTO M. BUERGER
Pennsylvania Station
New York 1, New York

Counsel for appellant The Long Island Rail Road Company.

INDEX TO JURISDICTIONAL STATEMENT

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
The Appellants Are Parties Aggrieved by the Decree From Which These Appeals Are Taken and Have Standing to Appeal Therefrom	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	15
A. Rule-Making and the Administrative Procedure Act	16
B. §1(11) of the Interstate Commerce Act	18
C. Section 5a and the Exercise of Rule-Making Power by the Car-Owning Roads	20
D. The Sherman Act	25
CONCLUSION	26

INDEX TO APPENDICES

PAGE

APPENDIX A—Opinions Below:

I. Majority Opinion of the District Court 1a

II. Dissenting Opinion in the District Court 22a

Judgment of the District Court 26a-1

Note: The report of the Interstate Commerce Commission, the proposed report of the Trial Examiner, and the Order of the Interstate Commerce Commission are bound separately in a Supplement to this Appendix A, filed herewith.

APPENDIX B—Statutes Involved:

Administrative Procedure Act:

Section 2 [60 Stat. 237 as amended; 5 U. S. C., §1001] 1b
Section 4 [60 Stat. 238; 5 U. S. C., §1003] 3b
Section 5 [60 Stat. 239; 5 U. S. C., §1004] 4b
Section 9 [60 Stat. 242, 5 U. S. C., §1008] 6b

Interstate Commerce Act:

Section 1, pars. 10, 11, 14(a) [40 Stat. 101 as amended; 49 U. S. C., §1(10)-(11)-(14)(a)] 7b
Section 5a [62 Stat. 472; 49 U. S. C., §5b] 8b
Section 13(1) [24 Stat. 383 as amended; 49 U. S. C., §13(1)] 11b
Section 15(2) [34 Stat. 589 as amended; 49 U. S. C., §15(2)] 12b
Section 16(1) [34 Stat. 590 as amended; 49 U. S. C., §16(1)] 12b

Sherman Act:

Section 1 [26 Stat. 209 as amended; 15 U. S. C., §1] 12b
Section 2 [26 Stat. 209 as amended; 15 U. S. C., §2] 14b

CASES CITED

PAGE

Ahnapee & Western Railroad Company v. Akron & Barberton Belt Railroad Co., et al., ICC Docket No. 31774, November 12, 1957, 302 ICC 265 ..... 9fn[7], 25fn[17]

idem March 7, 1957 by Div. 2, 300 ICC 73 ..... 9fn[7]

Alabama T. & N. R. Co. v. Aberdeen & R. R. Co., 274 ICC 383 (1949) ..... 8fn[5]

Association of American Railroads—Agreement, 277 ICC 413 (1950) ..... 9fn[7]

B. B. Chemical Co. v. Ellis, 314 U. S. 495 (1942) 25

Brimstone R. R. Co. v. United States, 276 U. S. 104 (1928) 18

Carter v. Carter Coal Co., 298 U. S. 238 (1936) 18, 24

Chicago, Burlington & Quincy R. Co., et al., v. New York, Susquehanna & Western R. Co., et al., I. C. C. Docket No. 31358, 297 ICC 291 ..... 6fn[1]

Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80 (1931) ..... 9fn[6], 19

Continental Wall-Paper Co. v. Voight & Sons Company, 212 U. S. 227 (1909) 25

Fed. Power Comm. v. Pac. Company, 307 U. S. 156 (1939) 3

Frozen Food Express v. United States, 351 U. S. 40 3

Gulf Refining Co. v. United States, 269 U. S. 125 (1925) 3

I. C. C. v. Baird, 194 U. S. 25 (1904) 3

Katzinger Co. v. Chicago Mfg. Co., 329 U. S. 394 (1947) 25

PAGE

Mercoid Corp. v. Midcontinent Co., 320 U. S. 661 (1944) 25

Mercoid Corp. v. Minneapolis Honeywell Regulator Co., 320 U. S. 680 (1944) 25

Missouri Pacific R. Co. v. Norwood, 283 U. S. 249 (1931) 19

Palmer v. United States, 75 F. Supp. 63 (D. D. C. 1947) ..... 8fn[4]

Rutkin v. Reinfeld, 229 F. 2d 248 (C. C. A. 2d 1956) 25

Schechter (A. L. A.) Poultry Corp. v. United States, 295 U. S. 495 (1935) 18, 24

Schwegmann Bros. v. Calvert Corporation, 341 U. S. 384 (1951) 21

Seatrain Lines Inc. v. Pennsylvania R. Co., et al., 207 Fed. 2d 255 (C. C. A. 3rd, 1953) 4

United States v. Baltimore & Ohio R. Co., 284 U. S. 195 (1931) 18

United States v. Capitol Transit Co., 325 U. S. 357 3

United States v. Detroit and Cleveland Navigation Co., 326 U. S. 236 3

United States v. Pierce Auto Freight Lines, 327 U. S. 515 3

United States v. United States Smelting and Refining Co., 339 U. S. 186 (1950) 4

STATUTES CITED

PAGE

Administrative Procedure Act:

(5 U. S. C. §§1001; 1003; 1004; 1008; 1009):

Section 2(c)-(d) (60 Stat. 237 as amended) 4, 17, 18

Section 4 (60 Stat. 238) 4, 17

Section 5 (60 Stat. 239) 4, 17

Section 9(a) (60 Stat. 242) 4, 18

Esch Car Service Act of May 29, 1917, c. 23, 40 Stat. 101 ..... 19fn[12]

Interstate Commerce Act:

Section 1(4) ..... 5, 13, 19, 20fn[13]

Section 1(10) (40 Stat. 101 as amended) 4, 13, 16, 19

Section 1(11) (40 Stat. 101 as amended) 4, 13, 14, 16, 19, 20, 21

Section 1(14)(a) (40 Stat. 101 as amended) 4, 5, 8, 13, 15, 16, 17, 18, 19, 22, 23, 24

Section 5a (62 Stat. 472) 4, 5, 6, 9, 15, 16, 20, 21, 25

Section 13(1) (24 Stat. 383 as amended) 4, 14

Section 15(2) (34 Stat. 589 as amended) 4, 18

Section 16(1) (34 Stat. 590 as amended) 4, 14

Maguire Act 21

Miller-Tydings Act 21

Sherman Act (26 Stat. 209 as amended):

Section 1 ..... 4, 6, 25

Section 2 ..... 4, 6, 25

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No.....

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY; ATLANTIC COAST LINE RAILROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CHESAPEAKE AND OHIO RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; ERIE RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; GULF, MOBILE & OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; LOUISVILLE AND NASHVILLE RAILROAD COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; READING COMPANY; THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; SOUTHERN RAILWAY COMPANY; TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; THE VIRGINIAN RAILWAY COMPANY; WABASH RAILROAD COMPANY and WESTERN MARYLAND RAILWAY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the District of Massachusetts entered May 5, 1958 setting aside an order of the Interstate Commerce Commission and remanding the cause to the Commission for further proceedings not inconsistent with the majority opinion of the three-judge Court in the respects specified in their notices of appeal, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial questions are presented.

OPINIONS BELOW

The majority opinion of the United States District Court for the District of Massachusetts is reported in 162 F. Supp. 289. The dissenting opinion is not reported. Copies of said opinions and of the Judgment of the District Court are set forth in Appendix A hereto. The report of the Interstate Commerce Commission reviewed by the District Court is reported in 297 ICC 291. The proposed report of the Trial Examiner (filed and served on all parties December 8, 1954), referred to in the majority opinion of the District Court, is not reported. Copies of said reports and of the Order of the Commission are set forth in the Supplement to Appendix A hereto, bound separately.

JURISDICTION

This suit was brought in the United States District Court for the District of Massachusetts, under 28 U. S. C. 1336, 1398, 2321-2325; 5 U. S. C. 1009 and 49 U. S. C. 17(9), to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on May 5, 1958 and notices of appeal were filed in that Court

by these appellants* on July 3, 1958. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capitol Transit Co.*, 325 U. S. 357; *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *Frozen Food Express* v. *United States*, 351 U. S. 40.

The Appellants are Parties Aggrieved by the Decree from which These Appeals Are Taken and Have Standing to Appeal Therefrom.

Although the final decree of the District Court granted the prayer of the appellants' complaint that the Interstate Commerce Commission order complained of be set aside, the decree also remanded the matter to the Commission "for further proceedings not inconsistent with" the majority opinion of the Court. By this mandate, which in effect incorporated the District Court's opinion in its judgment (see *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 1925), the conclusions reached by the District Court on the legal issues determinative of the questions presented on these appeals became res adjudicata, binding upon appellants not only in any renewed administrative proceedings (see *I. C. C.* v. *Baird*, 194 U. S. 25, 38, 1904; *Fed. Power Comm.* v. *Pac. Company*, 307 U. S. 156, 160, 1939) but in any collateral proceedings between the appellants and the inter-

* The Boston and Maine, The New York, New Haven and Hartford and The New Jersey and New York filed a joint notice of appeal. The Long Island filed a separate notice of appeal identical with that appeal in all respects except that it did not below and does not here assert any violation of the Sherman Act nor associate itself with any presentation hereinafter asserting such violation.

vening railroad defendants (*Seatrain Lines Inc.* v. *Pennsylvania R. Co., et al.*, 207 Fed. 2d 255, 259, C. C. A. 3rd 1953).

The situation here is not comparable to that in *United States* v. *United States Smelting and Refining Co.*, 339 U. S. 186 (1950); the first injunction there was interlocutory only. The decree in this case, although it may not finally determine the administrative proceeding in respect of which it was entered, does finally determine the suit in which it was entered. Any new I. C. C. order would be the subject of a new suit before a District Court, not necessarily even the same Court that determined this cause.

Accordingly, to avoid the impact of the decree as res adjudicata of the issues which were determined adversely to them and incorporated in the decree, the appellants are required, and therefore have standing to, appeal therefrom. *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89 (1954).

STATUTES INVOLVED

Administrative Procedure Act: Sections 2, in part (60 Stat. 237 as amended), 4 (60 Stat. 238), 5 (60 Stat. 239) and 9(a) (60 Stat. 242); *Interstate Commerce Act*: Sections 1, pars. 10, 11, 14(a) (40 Stat. 101 as amended), 5a (62 Stat. 472), 13(1) (24 Stat. 383 as amended), 15(2) (34 Stat. 589 as amended) and 16(1) (34 Stat. 590 as amended); *Sherman Act*: Sections 1 and 2 (26 Stat. 209 as amended).

The above statutes are set forth in Appendix B hereto.

QUESTIONS PRESENTED

(All references to the Act and to Sections (§§) in this Jurisdictional Statement are to the Interstate Commerce Act unless otherwise noted)

1. Does the Interstate Commerce Commission have authority to make a declaratory order in this proceeding, under Section 5(d) of the Administrative Procedure Act?

2. Where there has been no Commission action under Section 1(14)(a) regulating car-hire charges, does the Act impose as between carriers, or empower the Commission (otherwise than by rule under Section 1(14)(a)) to impose as between carriers, any obligation with respect to receiving or paying car-hire (other than the obligation imposed by Section 1(4) with respect to the operation of through routes)?

3. If so, does such obligation exceed

(a) in the case of the owner, an obligation not to receive car-hire in an amount which is unreasonably high, or (and)

(b) in the case of the user, an obligation to pay car-hire in an amount which is not unreasonably low?

4. Does the Act require, or empower the Commission to require, uniform observance of car-hire charges not established by the Commission?

5. Should the Commission entertain a proceeding to enforce, or* enter an order enforcing (or providing the basis for enforcing), uniform observance by non-assenting roads of car-hire charges fixed collectively, under an agreement approved by the Commission under Section 5a of the Act, by the owners of a majority of the railroad-owned freight cars?

STATEMENT OF THE CASE

(References to the Record below are given only as to those statements not clear from the District Court's majority opinion, the Commission's report, or the complaint before the Commission.)

The judgment appealed from, entered in a civil action brought by appellants and others as plaintiffs against the

---

* The words "entertain a proceeding to enforce, or" appear in this question as presented by the joint appeal of the three appellants first above named, but are omitted from this question in the appeal of the Long Island.

United States and the Interstate Commerce Commission to set aside a Commission order, unanimously vacated an order[1] of the Commission and, one judge dissenting, remanded the matter to the Commission for further proceedings not inconsistent with the majority opinion of the three-judge District Court. The majority held that the Commission had not adequately considered the issue of reasonableness; the dissenting judge did not reach that issue, since in his view the proceedings before the Commission should have been dismissed.

These plaintiffs appeal from this judgment insofar as it adjudges that the Commission has jurisdiction of the proceeding, as to the nature and extent of such jurisdiction, if any, that the Commission's order was not repugnant to or incompatible with §5a of the Interstate Commerce Act, and[2] that the maintenance of the proceeding before it was not incompatible with §§1 and 2 of the Sherman Act, and remands the matter to the Commission for further proceedings accordingly.

The Commission order relates to certain "per diem" charges. Railroad-owned freight cars are on the lines of railroads other than their owners for millions of car-days each year; the car-hire charge paid to the car-owning railroad, customarily calculated on a per-car per-day basis, is known as per diem. The frequently used term "per diem rate" can be misleading, since car-hire is not a rate in

---

[1] Entered October 17, 1955 in an adversary proceeding entitled *Chicago, Burlington & Quincy R. Co. et al.* v. *New York, Susquehanna & Western R. Co. et al.*, ICC Docket No. 31358, 297 ICC 291.

[2] Except for the Long Island, as to the matter from here to the comma after "Sherman Act".

the commerce sense,—it is not a tariff nor a charge to shippers for expenses incidental to transportation. Car-hire payments between carriers have no effect upon the freight rate level, nor upon the net income of the railroad industry considered as a unit.

The Commission order gave the declaratory relief requested by the complainant large car-owning railroads which initiated the proceeding. This order, as well as its effect (and that of the remand appealed from), is fully comprehensible only in the light of the controversy and the context in which it was made.

The parties to the controversy before the Commission divide into two groups:

(a) the appellant railroads, plaintiffs in the District Court action, defendants before the Commission, are predominantly traffic-terminating roads, *debtors* on settlement of net car-hire accounts;

(b) the appellee railroads, interveners as defendants in the District Court action, complainants before the Commission, are, in large majority, predominantly traffic-originating roads, *creditors* on settlement of net car-hire accounts.

Railroads acquire freight car ownership primarily to meet the demands of shippers on their lines (R. 842, 55, 576). Consequently, the great majority of the freight cars of this country are owned by roads which originate more traffic than they terminate. For the most part these roads are creditors on settlement of net car-hire accounts. In contrast, the appellants are "terminal" railroads, serving densely populated areas which consume more freight than they originate. The Boston & Maine, for example, ter-

minates three cars for every car it loads outbound (R. 701); the Long Island terminates four times as much traffic as it originates (R. 437). These roads necessarily send back substantial numbers of empties (R. 247, 869, 701).

An obligatory Car Service Rule,[3] designed to relieve commerce of the burden of excessive back-hauling of empty cars, requires every railroad to load available off-line cars for movement in homebound direction in priority to cars of its own. The effect of this Rule is to freeze appellants and other terminal roads in the status of car-hire debtors, with relatively small car-ownerships (R. 868-70, 45-6). As the terminating carriers cannot lawfully refuse to accept whatever cars are delivered to them for further transportation, they have no option to avoid incurring the obligation to pay rental for the cars of other roads (R. 868, 901, 849).

Although under §1(14)(a) the Commission has regulatory power to establish by rule the amount of rental "to be paid" as "compensation" for the use of cars of other roads, it has never exercised that power,—with one exception, when its exercise was set aside on judicial review, as done for a car service regulatory (rather than compensatory) purpose.[4]

Petitions that the Commission establish a car-hire charge by rule under §1(14)(a), filed by some short lines and other carriers in 1946-47, were dismissed by the Commission without its doing so in 1949.[5] Instead, the matter of car-hire has been left to agreement among the carriers, acting in recent years through their organization, the Association of American Railroads (known as the AAR). In

---

[3] Quoted in the majority opinion below, Appendix A, p. 11a.

[4] *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C. 1947).

[5] *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383 (1949), at 384, 399.

recent years also,[6] agreement among all carriers was obtained without serious dissent until 1946. Disagreement arose when the per diem charge was successively increased from $1.15 to $1.50 in 1947, to $1.75 in 1949, to $2.00 in 1952, and to $2.40 in 1953 (R. 244-5),—a rate of acceleration so much faster than the post-w... increases in freight rates (tariffs) allowed by the Commission that it nullified all their benefit as to the terminal roads, and reduced the net revenues of many of them to less than they were in 1944 (R. 898-902, and chart facing p. 46 of Ex. 53, R. 875-7).

The increases to $2.00 and $2.40 were fixed and put into effect under industry procedures set forth in an agreement between railroads dated April 1, 1950 known as Agreement No. 7, approved by the Commission in February 1950[7] under §5a (known as the Bulwinkle Act, 49 U. S. C. §5b). The earlier $1.75 charge, fixed under a predecessor agreement, was adopted and continued under Agreement No. 7 (Art. IX) until subsequently increased.

Both under Agreement No. 7 and its predecessor, final action on the above-mentioned increases was determined by industry vote. This vote is weighted heavily in favor of the large car-owning roads; each road has as many votes

---

[6] As to the earlier period, see Mr. Justice Stone's dissent in *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 1931.

[7] The Commission found that Agreement No. 7 (by Article XII):

> ". . . accords to each party thereto the free and unrestrained right to take independent action either before or after any determination arrived at through procedure established by the agreement; and that approval of the agreement is not prohibited by paragraph . . . (6) of Section 5a."

Association of American Railroads—Agreement, 277 ICC 413, at 425 (1950). Reopened and reconsidered, *Ahnapee & Western R. Co.* v. *Akron & Barberton Belt R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957 by Division 2, 300 ICC 73, and November 12, 1957 by the full Commission, 302 ICC 265.

as it owns cars (R. 248-9, Art. IV of Agreement No. 7). Since at least 1946, majority voting control of the car-hire charge has been vested in a relatively small group of large car-owning railroads. For example in 1952, 23 railroads (most of them complainants or intervenors in their support before the Commission) owned 1,121,225 of the total 1,776,-853 freight cars owned by Class I railroads (Ex. 14, R. 333, 863-4), and thus had over 63% of the total votes. The possession of this power by the per diem creditor roads, coupled with the financial inducement to exercise it, enabled the adoption by majority car-owning vote of the successive proposals for increases in the per diem charge (R. 862-4, 866-7). These proposals originated in the General Committee of the AAR (R. 248).

The AAR General Committee's own minutes and records show that its basic formula of calculation for the $1.50, $1.75, $2.00 and $2.40 charges (R. 335, 117, 119, 152, 78-9) was developed not to find a charge which would reflect accurate car-ownership costs plus a reasonable return on investment, but for the purpose of procuring statistical support for a per diem increase previously agreed upon.[8]

---

[8] At its meeting on January 21, 1947, the AAR General Committee determined on the increase to $1.50 (Ex. 40 "Notes of Discussion", pp. 27, 35, R. 823) despite the warning of New York Central's Mr. Dawson that the Committee had nothing "on which to base a $1.50 rate" (*idem*, p. 31). The first "studies" thereafter written up (Ex. 41, esp. last 4 pages, R. 823) fell 18.5¢ short of reaching this goal. Nevertheless, on February 26, 1947, the Committee again voted a prompt increase to $1.50 (Ex. 42, p. 2, R. 824-5). The next "studies" (Ex. 45A, p. 11, R. 1234, 1250) still fell short by 13¢. With further estimates, adjustments, etc., the next "studies" (which reached the General Committee July 17, 1947), showed precise support for $1.50 (Ex. 39, p. 2, R. 801, 823). The General Committee again voted the increase to $1.50 (*ibid.*) and it was promptly put through and made effective September 1, 1947 (R. 245, 82-3, Appendix A, p. 3a).

Less than four months after the Commission in July 1949 dismissed the short lines' petition for Commission regulatory action, the increase to $1.75 was made effective by action of the large car-owning roads (R. 245). To support this increase and the succeeding increases to $2.00 and $2.4[illegible], further successive changes were made in the formula (R. 91, 93-4 & fn. 11, p. 12, *infra*), in each case providing support for a greater increase than would have emerged from application of the previous formula to the "cost" figures of the latest available year.[9] Protests by terminal roads to the AAR (R. 874-5, 877-9) were rejected or ignored (R. 251-2, 878-9, 889-91).

Until 1951 the railroads generally, signers and nonsigners of Agreement No. 7 alike, settled with one another at the rates of charge adopted or determined thereunder. In March 1951, however, the New York, Susquehanna & Western Railroad (which was not a party to Agreement No. 7) served notice that it would no longer pay the $1.75 per diem charge then in effect (pp. 23-34 of Ex. 53, R. 875-7 & R. 882). Instead, it offered to settle its per diem accounts thenceforth on a differently calculated basis, reflecting the cost of the cars in the individual ownership of each road (R. 879-882, 902-8). The Boston and Maine and four other roads accepted the Susquehanna's offer (R. 882-3, 954).

All of the large car-owning roads rejected the offer (R. 883). Virtually all of them also refused or ignored the Susquehanna's subsequent offers to negotiate individual bases of settlement with each road (R. 890) and demanded that the Susquehanna pay the uniform industry-fixed charge, variously terming it "the established rate," "the going rate," "the rate fixed by the AAR" (R. 883). A con-

---

[9] See Commission Report, Appendix A, pp. 54a-55a and fn. 11, p. 12, *infra*.

siderable number of them attempted by coercive measures to compel the Susquehanna to pay the industry-fixed charge,[10] but the Susquehanna persisted in its refusal.

To support the increase to $2.40, a further formula change was made which *in itself* added more than $130,000,000 per year to the "costs" reflected in the per diem charge.[11] Eight roads which were subscribers to Agreement No. 7 refused to pay this increase, either withdrawing under Article X or exercising the "right to take independent action" under Article XII, and paid and offered to settle thereafter at $2.00 or other somewhat lower amounts.

As Susquehanna had done, Boston and Maine offered to agree on rental charges with each road individually. The roads which replied declined to enter into any arrangement other than the $2.40 (R. 400). It then made what it thought was "a general generous compromise offer" (R. 400-4, 420-1, 352-5, 409, 422). The complaint before the Commission followed almost at once. The increase to $2.40 was made effective on August 1, 1953 (R. 245). On September 21, 1953, the complaint was filed with the Commission against the Susquehanna and seven of these other non-assenting roads. (The eighth, The New Jersey and New York, was added by subsequent amendment.)

That complaint, complaining of the above refusals, alleged that to the extent that the payments tendered and

---

[10] The Louisville & Nashville attempted a boycott (Ex. 54, R. 884-6) which proved abortive; other roads withheld divisions of tariffs due the Susquehanna—in one case over 400 times the amount in dispute, routed traffic around it, altering customers' shipping instructions, etc. (R. 884, 954-5, 891-2, 895, 909-10).

[11] R. 173, 96-7; sheet No. 4 of Ex. 4, R. 69, 219: The difference between lines 13 and 3 ($4,170,742,649) was added to the depreciation base. At 3.12% annually (*idem.* line 20), this added $130,127,170 per year.

offered by these nine roads in settlement of their car-hire accounts were less than the uniform charges which had been fixed under the industry procedures embodied in Agreement No. 7, such payments, tenders and offers "are and would be unjust, unreasonable and noncompensatory, in violation of Paragraphs (4), (10) and (11) of Section 1 of the Act."

The complainants did not seek money damages; as relief they asked that the Commission "find and declare" that the $1.75 and $2.00 per diem charges "during the periods in which these rates were effective" were, and that the $2.40 per diem charge effective August 1, 1953 is "just, reasonable, and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers."

In their principal brief to the Commission,* the complainants disclaimed any intention to invoke the Commission's regulatory power to establish car-hire charges under §1(14)(a). As the Commission said in its report, "Such action . . . would render the present procedure for dealing with per diem charges inoperative." Instead, they expressly asked "that after settling the present controversy by appropriate findings the Commission should release the subject matter to the industry for private handling"* under the procedures of Agreement No. 7, stating that the Commission findings sought by complainants

> "will be sufficient and effective as the basis for settling outstanding per diem balances and for assuring observance of whatever may be the established rate in the future."*

---

* Par. 40 of the complaint in this action, admitted by answer of intervening defendants (par. 25); accuracy of quotations admitted by answer of United States (par. 25).

The Commission granted the relief prayed for. It found and declared

> "... that the per diem charges of $1.75, $2, and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use."

after first holding

> "... our finding below specifies the per diem charges which, on the basis of the facts and circumstances before us, could properly be established under Section 1(14)(a). It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past."

The order discontinued the proceeding and "made a part [t]hereof" the Commission's report "containing its findings of fact and conclusions thereon." The petition of defendants (plaintiffs-appellants here) for reconsideration, reargument and rehearing was denied July 16, 1956.

The District Court held that the Commission (under §§13(1), 16 and 1(11)) has jurisdiction to determine whether and to what extent the rental prices fixed by collective industry action exceed *the maximum* of what is reasonable, and to award recoupment of any such excess to protesting roads,—the latter acting at their peril if they fail to pay the collectively-fixed prices in the first instance, however unreasonable. The Court thus substitutes for the non-assenters' statutory right to bargain independently a requirement that non-assenters are bound to pay whatever uniform price is fixed by collective industry-group action, provided only that that uniform price does not exceed *the maximum limit* of the zone of reasonableness. If, as these

appellants contend, Agreement No. 7 does not authorize and §5a(9) does not exempt collective action which will bind non-assenters, the District Court has also held that the Commission may lend the aid of its adjudicatory powers to parties acting in furtherance of a combination and conspiracy unlawful under the Sherman Law.

By its decree remanding the cause, the District Court has directed further Commission proceedings to be had in accordance with these holdings.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by these appeals have not previously been decided by this Court, or by any other Court except the Court below. They are basic to the resolution of a controversy which has divided the railroad industry for years. Although unanimous in rejecting the Commission's order, the Court below divided as to the disposition of the case. The dissenting judge was of the opinion that the statutory safeguards of both §5a and §1(14)(a) were destroyed by the holdings of the majority, that "Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads", that approval of the Commission's order would endorse "the clearest of anti-trust violations by illegal price-fixing", that the Commission has no jurisdiction, and that the cause should not be remanded to it for further proceedings.

These appeals raise serious questions of administrative law of general importance as to the interpretation of the Administrative Procedure and Interstate Commerce Acts, and the extent of Sherman Act exemption under §5a.

The decision below gives judicial approval to an order which, though adjudicatory in form, delegates agency rule-making authority to a dominant segment of the industry acting collectively by agreement, and also gives retroactive regulatory effect to the collective uniform price-fixing actions of that industry segment. The applicable rule-making provision, §1(14)(a), specifically includes the subject matter of "compensation" payable by one railroad for the use of another's cars, whereas §§1(10) and 1(11), enacted contemporaneously therewith, make no reference thereto. But the Court below reads "compensation" into the latter provisions in order to find Commission jurisdiction thereunder.

Further, this case presents for the first time for judicial construction the scope of the anti-trust exemption granted by §5a (the "Bulwinkle Act"). The decision below ignores the limitations on exemption specified in §5a(9) as to "the carrying out" of a Commission-approved price-fixing agreement, and it strips all substance from the important right granted to non-assenting railroads by §5a(6) "to take independent action" with respect to collective industry price-fixing determinations. The decision below also holds that agency adjudicatory processes may be utilized in aid of enforcing against non-assenters collective industry price-fixing determinations—insulated from the Sherman Act.

A. Rule-Making and the Administrative Procedure Act:

The decision authorizes the Commission to by-pass the expressly applicable rule-making provision, §1(14)(a), by resorting to declaratory order procedure. While a majority of the Court finds adjudicatory jurisdiction under §1(11) to support a declaratory order as between individual carriers, it also finds the result of such adjudication and declaration to be, in practical effect, uniformly binding upon

the entire industry, not merely upon the litigants (Appendix A, p. 6a, fn. 4); the end result, in other words, is *rule-making*. Indeed, the avowed purpose of the Commission proceeding, initiated by the dominant industry group, was to have the Commission declare and make enforceable a rule of general application which would be binding upon the whole industry. Clearly, if the Commission may promulgate car-hire rules without resort to §1(14)(a), the statutory safeguards surrounding the rule-making procedure are circumvented, and the Congressional intent frustrated.

The decision also authorizes the use of declaratory order procedure in a proceeding which, although in form adjudicatory, is in purpose and in practical effect regulatory. Congress, on the other hand, in the Administrative Procedure Act, clearly evidenced its intent to confine that procedure to cases where it would serve to resolve private controversies as to matters otherwise within the jurisdiction of the administrative agency,—in contradistinction to the promulgation of general rules and regulations. (Administrative Procedure Act, §§2(c)-(d), 4, 5). If the decision below stands, agency rules need no longer be promulgated under expressly applicable rule-making provisions. Undoubtedly it may often be more expedient to the dominant section of the industry, if not to the agency involved, to resort to declaratory order procedure.

Moreover, this controversy concerns the proper car-hire charge for the *past* as well as for the present and the future. By approving a declaratory order in a case such as this, although recognizing that as a practical matter, it will be binding upon the entire industry as well as upon the parties, the decision below authorizes the Commission to promulgate indirectly, by following the form of an adjudicatory proceeding, retroactive rules respecting car-hire which it

could not promulgate directly under §1(14)(a). (§15(2); Administrative Procedure Act §2(c); cf. *Brimstone R.R. Co.* v. *United States,* 276 U. S. 104, 1928; cf. also *United States* v. *Baltimore and Ohio R. Co.,* 284 U. S. 195, 1931.)

Finally, to authorize the Commission to compel not only the non-assenting railroads parties to the litigation before it, but every railroad in the country, to observe for the future as well as retroactively, a uniform car-hire charge fixed by the car-owning roads is, in essence, to approve a delegation of agency rule-making authority to private persons. (Cf. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 537, 1935; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 311, 1936.)

B. § 1(11) of the Interstate Commerce Act:

While recognizing that in practical effect the Commission's order established a uniform rule binding on all railroads, the majority opinion treats with it as one declaring the separate rights and duties of individual carriers parties to the proceeding before it, and therefore adjudicatory in nature. Meeting the District Court on its own ground, it is clear, as the District Court itself recognized, that the Commission had jurisdiction to make a declaratory order only if it had jurisdiction to adjudicate (Administrative Procedure Act §9(a)), and had jurisdiction to adjudicate only if the Act imposed statutory duties upon *both* car-owners and car-users with respect to the receipt and payment of the car-hire charges in issue under the complaint before it.

A duty merely upon the car-owners not to receive car-hire in an amount exceeding the limit of reasonableness would not support jurisdiction. The controversy and uncer-

tainty underlying the proceeding before the Commission concern not the right of the car-owners to receive, but *the duty of the car-users to pay,* the car-hire charges demanded by the owners. Hence, any order which left the car-users free to pay or not as they might choose would neither terminate the controversy nor remove the uncertainty.

Recognizing this, the District Court postulated as the basis for its conclusion that the Commission had jurisdiction, its determination that §1(11) of the Act not only imposes upon every car-owner the statutory duty not to receive amounts in payment for car-hire in excess of the maximum limit of reasonable compensation (Appendix A pp. 7a-10a), but imposes upon every car-user the correlative duty to pay the amount demanded by the owner, at least if within that limit (*ibid.* and *id.* p. 6a, fn. 4).

Specific statutory reference is made to compensation as between carriers in §1(14)(a) and in §1(4) (the earlier through routes provision); by contrast no such reference appears in §§1(11) and 1(10), which were adopted at the same time and as part of the same legislation[12] as §1(14). From the standpoint of statutory construction, therefore, the question is: whether the inclusion of such reference in some sections and its exclusion from others should be disregarded, in order to support an interpretation of §1(11) as embracing the subject-matter of compensation for the use of cars. (Cf. *Chicago, Rock Island & Pacific Railway Co.* v. *United States,* 284 U. S. 80, 99, 1931; see also *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 257, 1931.)

Even if these differences in statutory specification of subject matter are to be given no differentiating signifi-

[12] The Esch Car Service Act of May 29, 1917, c. 23, 40 Stat. 101.

cance, the broader question nevertheless arises: whether the imposition by §1(11) on carriers of general duties respecting "car service" should be interpreted to impose upon a car-user who is required by law to use the car of another railroad, the duty to pay therefor whatever charge the owner may see fit to demand, provided only the amount so demanded does not exceed the maximum limits of reasonableness.[13] Congress has not, in any other field[14] which has come to our attention, given to one private party such power over the economic destiny of another.

If it be suggested that the Commission can and will protect the car-user against the car-owner's natural tendency to maximize the amount of car-hire, the short answer is that under the decision of the District Court the Commission's adjudicatory jurisdiction is limited to determining whether the charge demanded by the car-owner exceeds the maximum limits of reasonableness.

C. Section 5a and the Exercise of Rule-Making Power by the Car-Owning Roads:

Assuming (contrary to these appellants' belief) that §1(11) of the Act imposes upon carriers any duties with respect to the payment of compensation for car use, those

---

[13] Obligations under §1(4) in respect of through routes, except where established by the Commission, rest in the last analysis upon agreement among the participating carriers; and obligations in respect of the operation of such routes, therefore, likewise are based upon agreement among the carriers and not upon the unilateral determination of one of the carriers involved.

[14] The situation as to freight rates does not afford a parallel since no shipper is required by law to avail himself of the facilities of a particular carrier, and competition with other types of carriers, if not with other railroads, is always open to keep the rates down to a fair competitive level.

duties are imposed upon them severally and not collectively. Moreover, the requirement is that the rules and practices respecting car service shall be reasonable—not that they be uniform. Indeed, a uniform rule which was entirely reasonable as applied under some circumstances might be wholly unreasonable under other circumstances. And whatever practical advantages might appear to flow from a uniform rule for the calculation of car-hire applicable to all railroads, the question remains: whether any such uniform rule which has not been established by the Commission in the exercise of its undoubted rule-making power, but by private agreement of the owners of a majority of the freight cars, can be imposed upon these appellants and other carriers without their assent, and be enforced by the Commission in the exercise of its adjudicatory powers under §1(11).

The right to confer and to agree upon such matters is given to railroads by §5a of the Act by way of derogation from the general prohibitions of the Sherman Law. But any agreement reached under that Section is required to, and in this case did, reserve to all parties to the agreement the "free and unrestrained right to take independent action" with respect to any determinations arrived at under the agreement's procedure.

Even without such a provision, this Court concluded, in *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384 (1951), that the analogous exemption under the Miller-Tydings Act did not, in the absence of express statutory provision therefor, extend to an attempt to impose prices fixed under a price-fixing arrangement on others not voluntarily assenting thereto. In the Miller-Tydings Act and the later Maguire Act, it may be noted, Congress has expressly limited the exemption to situations where product com-

petition serves as a check upon the natural tendency of every seller to maximize his return. In the case of agreements as to freight rates, similarly, Section 5a automatically provides the same safeguards, since railroads compete for the patronage of shippers not only among themselves but with other forms of transportation.

But not so as to car-hire: in their use of freight cars, the appellants and other terminal railroads provide the car-owners with a truly captive market. There is no competition among car-owners in the tendering of cars; whatever cars are tendered to the car-users they must take. Car-users are not even free to use their own cars for shipments off-line unless there are no foreign-owned cars on their lines available for loading. In the last analysis, the car-owning railroads, in fixing their charge, are not even subject to the normal laws of supply and demand: the "amount which the traffic will bear" is the highest amount which the terminal roads are able to pay and still remain in business.

Thus, if a using road is not free to refuse to pay the charges demanded of it and thereby equalize its negotiating position or force Commission regulation under §1(14)(a), economically speaking it is completely at the mercy of the car-owners. Participation in the procedures by which the charges are arrived at affords no protection; under the agreement which the Commission has approved, the power to fix the charge is vested in the roads owning a majority of the freight cars, that is, in the creditor roads. Over the past twelve years, as the Record shows, they have exercised that power in their own interest, to fix higher and higher charges, each successive increase being based in large measure not on changes in the underlying costs of car own-

ership but on changes in the formulae by which such "costs" are determined. Unless unanimous assent is required, it would, indeed, be quite unrealistic to expect the railroads participating in the price-fixing process permanently to be guided by anything other than their own self-interest.

The power which the District Court holds the Commission to possess, to award refund of charges paid which are in excess of the maximum limits of reasonable compensation, would give the debtor roads only a limited measure of protection, by no means equivalent either to the protection which competition gives to shippers with regard to freight rates, or to that which the alternative of responsible Commission regulation under §1(14)(a) would give to car-users. And it is such responsible Commission regulation which, in our view, Congress intended as the sole alternative to voluntary agreement among the railroads involved.

As the Commission almost explicity avows,[15] in passing upon the car-hire charges fixed by the car-owners the Commission acted not as a regulatory but as a reviewing body, whose function (under the District Court's decision) is not to prescribe the proper car-hire charge but to determine whether the charge prescribed by the car-owners exceeds permissible limits.

If we assume, for the sake of the present discussion only, that every one of the formulae that the car-owners devised to support their increased car-hire charges could

---

[15] In its statement that because the charges which the car-owning roads had collectively fixed under the agreement could properly be established by the Commission itself under Section 1(14)(a), "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." (Appendix A, p. 59a)

have been employed by the Commission as the basis for prescription of car-hire charges under §1(14)(a), then it should also, we suggest, be assumed that the Commission would not, over the years, successively have changed its formulae in each instance in such a way as to increase the car-hire charges over what they would have been under the formula previously employed. It may also be doubted whether the Commission would have adopted, in prescribing car-hire charges, bases and standards of valuation[16] which it does not employ in exercising its regulatory functions affecting the income of carriers from transportation services.

When all procedural niceties have been cut through, it becomes apparent that what is here involved is the formulation and enforcement of a general rule, which is the essence of regulation, and that the primary regulatory function has been performed not by the Commission but by the car-owners themselves. The present question, accordingly, comes to this: Has Congress conferred upon the car-owners the power, unchecked by competition, jointly to formulate rules with respect to the amount of car-hire payable, to be uniformly observed by car-users, and has it authorized the Commission to enforce rules so formulated if within the outside limits of reasonableness? We know of no case in which Congress has given such power to any other private industry group in like circumstances. (Cf. *A. L. A. Schechter Poultry Corp.* v. *United States; Carter* v. *Carter Coal Co., supra.*)

---

[16] *e.g.*, the use of estimated reproduction value as the base for calculating depreciation and return on investment.

D. The Sherman Act:

If we are sustained in our view that agreement among some railroads upon the rate of car-hire to be paid by other, and objecting, railroads is authorized neither by §5a of the Act nor by the Commission-approved agreement thereunder[17], it necessarily follows that the attempts which (as the Record shows) numerous railroads have made to enforce their agreed rates upon these appellants and other non-assenting railroads were not statutorily exempted by §5a(9) of the Interstate Commerce Act, and therefore were in violation of §§1 and 2 of the Sherman Act. The complaint before the Commission explicitly avows as its object such enforcement of those agreed rates—not, be it noted, the adoption of those rates as rates formulated and prescribed by the Commission in the exercise of its regulatory function. The question is thus squarely presented whether the established rule that no court will lend its aid to the implementation of an unlawful conspiracy (*Continental Wall-Paper Co.* v. *Voight & Sons Company,* 212 U. S. 227, 1909; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495, 1942; *Mercoid Corp.* v. *Midcontinent Co.,* 320 U. S. 661, 1944; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.,* 320 U. S. 680, 1944; *Katzinger Co.* v. *Chicago Mfg. Co.,* 329 U. S. 394, 1947; *Rutkin* v. *Reinfeld,* 229 F. 2d 248, C. C. A. 2d 1956) applies also to an administrative tribunal.

---

[17] See *Ahnapee & Western Railway Company, et al.* v. *Akron & Barberton Belt Railroad Co. et al.,* I. C. C. Docket No. 31774, November 12, 1957, 302 ICC 265.

CONCLUSION

The Court has jurisdiction of these appeals, and the questions presented thereby are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

CARL E. NEWTON
Counsel for appellants Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company

WILLIAM T. GRIFFIN
Counsel for appellants Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company

RICHARD SWAN BUELL
Counsel for appellant The New Jersey and New York Railroad Company, Horace Banta, Trustee

OTTO M. BUERGER
Counsel for appellant The Long Island Rail Road Company

HERBERT ALPERT
WILLIAM A. COLTON
JAMES W. GRADY
JOSEPH P. HAWRYLUK
THEODORE S. HOPE, JR.
RICHARD H. STOKES
GRANVILLE WHITTLESEY, JR.
Of Counsel

APPENDIX A

Opinions Below

I. Majority Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

BEFORE WOODBURY, Circuit Judge, AND WYZANSKI AND McCARTHY, District Judges, by designation of Chief Judge MAGRUDER pursuant to Title 28 U.S.C. §2284.

OPINION OF THE COURT

April 28, 1958

WOODBURY, Circuit Judge. This is a controversy, in the main between the long-haul trunk line railroads and the short-haul terminal railroads, over the price a railroad ought to pay for the use on its lines of freight cars owned by another railroad.

The question of car hire is not novel. To understand its present aspects a little history will prove helpful.

In the early days of railroading in this country no railroad allowed its freight cars to leave its rails. Through freight to be transported over more than one line was unloaded and reloaded at junction points. With the development of more efficient transportation methods following the Civil War this wasteful and time-consuming practice of transferring cargo was gradually abandoned and for a charge the railroads began to permit their loaded cars to move off their tracks on to the tracks of connecting carriers.[1] At first the compensation to the car-owning road was fixed by the railroads on the basis of the mileage travelled by the cars of one road over the tracks of another. This basis for compensation, however, proved unsatisfactory largely for two reasons; the car-owning road had no means of verifying the mileage travelled by each of its cars over other lines and it provided no incentive to the using road for the prompt handling and early return of cars to their owners.[2]

As a solution the American Railway Association about the turn of the century, after years of study and investigation, established as the basis for compensation a flat sum per day for car use, regardless of the type or age of the car involved or the distance it travelled over the user's line. The *per diem* rate for use, known simply as the *per diem*, was gradually increased by the railroads over the years until it reached a point in the early 1950's at which the short- haul, terminating, and predominantly car-using railroads rebelled. This brings us to the present controversy and its background.

---

[1] In 1911 car interchange was made obligatory.

[2] For a more detailed history see *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 90 *et seq.* (1931), and Stone, J., dissenting, at page 101 *et seq.*

Except for one abortive attempt by the Interstate Commerce Commission, see *Palmer* v. *United States*, 75 F. Supp. 63 (1947), the *per diem* rate has always been set by the railroads themselves acting in recent years through their organization, the Association of American Railroads, known as the AAR. An agreement, known as Agreement No. 7, was drafted by the AAR setting up the procedures to be followed by it in fixing *per diem* rates and this agreement was signed by a majority of the railroads.[3] Acting according to the procedures outlined in the agreement, *per diem* rates were fixed at $1.50 as of September 1, 1947; $1.75 as of November 1, 1949; $2.00 as of May 1, 1952; and $2.40 as of August 1, 1953.

At first the railroads generally, signers and non-signers of the agreement alike, settled with one another at the rates established thereunder. In March, 1951, however, the New York, Susquehanna & Western Railroad (Susquehanna hereinafter), which was not a party to the agreement, served notice that after April 1 it would no longer pay the $1.75 rate then in effect, but offered to settle its *per diem* debit balances thereafter on a graduated scale ranging from $1.20 to $2.00 depending on the age of the cars it used. It later offered to increase its scale to a range of from $1.33 to $2.21 but its offers were not accepted and in consequence it became embroiled in a number of law suits. In June, 1953, the Boston & Maine Railroad and the New York, New Haven and Hartford Railroad Company withdrew from the agreement and gave notice of their refusal to pay the $2.40 rate and also even the earlier $2.00 rate

---

[3] The Agreement provided for rights of withdrawal and independent action by the signatory railroads, and the Commission, acting under §5a(2) of the Act, approved it as in compliance with §5a(6) and therefore valid in spite of the Anti Trust Laws. *Association of American Railroads—Agreement*, 277 ICC 413. Reopened and reconsidered *Ahnapee & W. R. Co.* v. *Akron & B. R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957.

after July 31, 1954 [*sic.*—actually 1953] the Boston & Maine offering to pay on either a graduated basis or at a flat rate of $1.72 per day. Several other railroads took similar courses and the present proceeding ensued.

It started with a complaint filed with the Interstate Commerce Commission by 19 of the larger class I railroads, against five other class I railroads, all of them short-haul roads like the Boston & Maine, the New Haven, and the Susquehanna, and six short-line roads in classes II and III, such as the Barre and Chelsea, the St. Johnsbury & Lamoille County and the New Jersey and New York Railway Company (Horace Banta, Trustee). Fifteen class I railroads intervened on behalf of the complainants and fifty-six railroads, for the most part in classes II and III, intervened on behalf of the respondents.

The complainants disclaimed any intention to invoke the specific power conferred on the Commission by §1(14)(a) of the Act which authorizes it "to establish reasonable rules, regulations and practices with respect * * * to the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it * * *." Instead, alleging that charges less than those fixed under Agreement No. 7 would be unjust, unreasonable and non-compensatory, and that the respondents' actions in offering to pay at other than the uniform *per diem* rate established therein, had been, were and would be disruptive of the "uniform national basis" for handling *per diem* which the Commission had deemed necessary in the public interest, the complainants asked that:

> "the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which

these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises."

The defendants answered, in general challenging the *per diem* rates established under the agreement as excessive and asserting that their offers of settlement were fair, just reasonable and compensatory. In addition some of them challenged the jurisdiction of the Commission to entertain the complaint. The matter came on for hearing before a trial examiner and he, upon full presentation, filed a proposed report wherein after considering the evidence and arguments in detail he concluded that "The Commission should find and declare that the *per diem* charges of $1.75 and $2.00 were reasonable during the periods in which they were effective and that a reasonable charge for present use would be $2.10." He accordingly recommended the entry of a declaratory order to that effect.

On exceptions the full Commission reached conclusions differing in part from those reached by the trial examiner. It found on its analysis of the evidence and the arguments that the *per diem* rates as fixed in the agreement were fair and reasonable. It said that "on the basis of the facts and circumstances before us" the *per diem* charges specified in the agreement were such as "could properly

be established under section 1(14)(a)" of the Act and that: "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." Wherefore, it said: "We find and declare that the *per diem* charges of $1.75, $2.00 and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use," and it entered an order discontinuing the proceeding.[4] *Chicago, Burlington & Quincy Railroad Co.* v. *New York, Susquehanna & Western Railroad Co.*, 297 ICC 291 (1955), reconsideration and rehearing etc. denied, July 16, 1956.

At the outset of our consideration of this action brought by a number of terminal short-haul railroads under Title 28 U.S.C. §1336 to enjoin, set aside and annul the above order of the Interstate Commerce Commission, we are faced with the question of its jurisdiction. The assertion is, broadly stated, that the only jurisdiction conferred by Congress on the Commission in the premises is that embodied in §1(14)(a) giving it power to "establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" by one railroad for the use of the cars of another, and that, since this jurisdiction was neither invoked nor exercised, it must follow that the Commission does not have authority

---

[4] We have little doubt that the Commission's order is subject to judicial review under the rule of *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), for the practical impact of the order is to require the respondent carriers, and, indeed, as a practical matter all others, to pay the charges for car-use found to be reasonably compensatory at the risk of the imposition of sanctions for violating §1(11) of the Act to be considered presently.

to enter a declaratory order as to past or even present rates. We do not agree.

Section 5(d) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. §1004(d) provides that within its jurisdiction any agency "is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." There can be no doubt that the railroads involved are subject to the jurisdiction of the Commission, nor can there be any doubt that a "controversy" exists between them with respect to car-hire. The question is whether the subject matter of their controversy is within the jurisdiction of the Commission. We think that it is.

Certainly the Commission could if it chose, after notice, embark under §1(14)(a) of the Act upon a full scale investigation and as a result establish by reasonable rules or regulations future practices with respect to car service, including the compensation to be paid by one railroad for the use of freight cars owned by another railroad. But it was not asked to do this and it has disclaimed any intention to do so.

Section 1(14)(a), however, is not the only section of the Act conferring regulatory powers on the Commission with respect to the use by one railroad of another's cars. Section 1(10) defines "car service" to include the "use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this chapter," and subsection (11) provides:

> "It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

In addition to the criminal sanctions imposed by §10 of the Act, §8 provides that in the event that any common carrier by railroad subject to the Act shall do, or cause or permit to be done, any act, matter or thing "prohibited or declared to be unlawful" it "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable counsel fee. And §9, gives persons claiming damages under §8 the election of proceeding in a court of competent jurisdiction or else making a "complaint to the Commission as hereinafter provided." Section 13(1) of the Act provides for the filing with the Commission of complaints against carriers for violations of the Act and §16(1) provides:

> "If, after hearing on a complaint made as provided in §13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is true that compensation for the use of cars is not specifically included in the definition of "car service" in subsection 10, whereas §1(14)(a) in giving the Commission power to "establish reasonable rules, regulations and practices with respect to car service" goes on to state "including the compensation to be paid * * * for the use of any * * * car or other vehicle not owned by the carrier using it * * *." It is asserted that the provisions being in some respects in *pari materia* the specific inclusion of compensation for use in §1(14)(a) indicates clearly that the omission of any mention of compensation in defining car service in subsection 10 could not have been inadvertent with the result that Congress must have intended in subsection 11 to impose no duty on the railroads to establish, observe and enforce just and reasonable *per diem* charges. We do not find the argument persuasive.

Car service is broadly defined in subsection 10 to include the "use" and "interchange" of cars, and historically and also very naturally, compensation has always been incidental to and an integral part of the "interchange" of cars between railroads and the "use" of the cars of one railroad by another. Moreover, to construe compensation as outside the ambit of the meaning of "use" or "interchange" as used in subsection (10) would leave the railroads free to make whatever "unjust" or "unreasonable" rules, regulations or practices they might choose with respect to compensation for car use without running afoul of subsection (11). It is hard for us to assume that Congress could have intended any such thing. On the contrary, we think it far more

likely that Congress intended to give a right of action for damages to any one suffering loss from an excessive rate of hire for the use of cars.

Our conclusion therefore is that §1(11) reasonably construed imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads, that §13(1) empowers the Commission to entertain complaints alleging excessive charges for car hire, and that §16 gives the Commission authority to enter orders awarding damages to those harmed by excessive car hire charges. Thus, since the Commission has jurisdiction to enter an order awarding damages for past or present unreasonable charges for car hire, it has jurisdiction under §5(d) of the Administrative Procedure Act in its discretion to enter a declaratory order with respect to the reasonableness of such charges.

We turn now to the merits.

The trunk line long-haul railroads, serving as they do the relatively sparsely settled and predominantly producing areas of the country, originate more traffic than they terminate. The short-haul railroads serving the coastal ports and the relatively more heavily populated and predominantly manufacturing areas, on the contrary, terminate more traffic than they originate. Thus, since a railroad must provide cars enough to handle the freight originating on its lines, the freight car equipment of the country is for the most part owned by the trunk line railroads and that owned by the short-haul lines is almost a negligible proportion of the whole. See *Chicago R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 93, 95 (1931). This

situation does not exist because of default by the short lines. Having more cars coming in from other lines to unload than they have cars to load and send back, they naturally, to avoid back hauling empty cars, prefer to load and return foreign cars instead of loading their own cars for dispatch off their lines. And this practice has the sanction of Car Service Rule 1, see *Car Service, Freight Cars*, 268 ICC 687, which provides:

> "Home cars shall not be used for [the] movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

From the fact that railroads first load off-line freight on available foreign line cars, it is obvious that if a short-line predominantly freight-terminating road owns many cars it will have a surplus which must perforce remain wastefully idle on its sidings awaiting an overflow of traffic, if any. Thus the trunk lines, as owners, for the most part furnish the freight car equipment used by the short lines and the short line traffic-terminating roads are perforce *per diem* debit roads, interested in a low *per diem* rate, whereas the long-haul predominantly traffic-originating roads are *per diem* credit roads interested in a high *per diem* rate. The present controversy stems from this conflict of interest.

The short line roads contend that under Agreement 7 mentioned above the trunk lines through their voting power (under the agreement *per diem* rate increases are authorized by vote of the signatory railroads, each road casting one vote for each freight car that it owns) have raised

the *per diem* rate to a more than compensatory level, and they charge the Commission with error in putting its stamp of approval on the rate increases established under the agreement.

There is not and cannot be any question that every railroad is entitled to be paid fair and just compensation for the use of its freight cars by another road. Nor can there be any question that from the car owner's point of view *per diem* is by and large and on the whole a fair enough method for calculating the compensation to which it is entitled. The question is whether *per diem,* which takes account only of the time factor and leaves out altogether the use factor, that is distance travelled on the user's line, is a fair method of determining compensation from the car user's point of view. And, if this question be answered in the affirmative and *per diem* be approved as the fairest practical method for calculating compensation from both points of view, the question then arises whether the Commission erred in its calculation of the fair *per diem* rate. We shall consider the question last stated first.

It has long been generally recognized that car hire, however established, should be enough reasonably to compensate the car owner for its costs of ownership and no more, and with this in mind that the *per diem* charge should be enough, but no more than enough, to cover the cost to the car owner of 1) repairs, 2) taxes, 3) depreciation, 4) interest on investment, and 5) miscellaneous expenses of ownership. Obviously therefore the determination of the *per diem* rate poses a complicated question of railroad cost accounting committed by law

to the Commission as a matter peculiarly within its expert competence. We therefore approach our analysis of the Commission's computations with due deference.

Detailed analysis of the Commission's computations with respect to each one of the items of car ownership expense listed above is not necessary for present purposes. We shall consider but two of them, repairs and depreciation, and the so-called "car day divisor" by which annual costs of freight car ownership are divided to reach the cost per day.

The item for repairs, the largest single component of the *per diem* charge, was calculated by the Commission largely on the basis of an account required by the Commission to be kept by all railroads known as Account 314, Freight Train Cars—Repairs. This account is of a comprehensive nature including the cost of repairs to cabooses and refrigerator cars not covered by *per diem,* and a number of other costs and expenses not directly related to the use of foreign cars. The Commission made allowances for some of these irrelevant costs included in the account but it rejected the suggestion that the account be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car. Such a break down of the account was recommended by the Subcommittee on Mileage and Per Diem of the AAR, which was charged with the specific duty of fixing *per diem* under Agreement No. 7, but the General Committee of the AAR having final say on *per diem* rejected the recommendation.

There was persuasive evidence that a break down of the account was practical, indeed, that some railroads at little

accounting cost were already doing so for their own information. Nevertheless the Commission said:

> "The recommendation of the Subcommittee deserves further consideration. However, it is not desirable to delay the decision of this case pending an effort to provide additional data bearing on car repairs."

Perhaps it is within the Commission's competence to reject the recommendation in the interest of expedition. But we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of *per diem* and also to show that such a break down was not impractical.

Depreciation, the second largest element of the *per diem* charge, was calculated by the trial examiner on the basis of the undepreciated ledger value, that is the cost, of the freight car equipment in use which he said was "in accordance with the generally accepted accounting theory." The Commission, however, disagreed. It held that the basis should be "undepreciated reproduction value." We think that this holding is open to very serious question.

The Commission said that it realized that the prevailing accounting practice in determining depreciation was to use ledger value. But it said that it was "not here concerned with the propriety of that practice," because it was engaged in determining the just and reasonable *per diem* rates in effect at the present and during the relevant

periods in the past, and in reaching that determination it would be less than realistic if it failed to take into consideration "that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values."

If depreciation is an element, and not a minor one, of the *per diem* charge, we fail to see why accepted accounting practices for determining depreciation should be tossed aside as irrelevant. Moreover, as the trial examiner pointed out, ledger value is a known figure whereas the cost of reproduction can at best only be estimated and the process is inherently difficult because it involves many assumptions which are at least open to question. Furthermore, there is persuasive evidence that with ever faster freight trains and ever more efficient use of cars, present freight car requirements are met with fewer cars than were formerly needed with the result that in all probability many cars now in use will never actually be replaced so that on the Commission's basis car users in paying *per diem* will in part be compensating car owners for expenses they will never incur.

We turn now to the "car day divisor" by which the Commission determined the average cost per day of car ownership.

It appears to be generally agreed that surplus or unservicable cars should not be included in computing the average daily cost of owning a freight car. The question therefore is to determine the average number of days per year that freight cars are in active use, that is to say, either in active use on the line of the owner, or else on a

foreign line, whether in active use thereon, or laid up for repairs, or standing idle. Since no car is in active use all the time an adjustment is necessary to spread the actual annual cost of ownership over the shorter period when the car is in active use. This is accomplished by means of a car-utilization ratio which is, simply, the ratio which the average number of days a freight car is in active use bears to 365, the number of days in the year.

Since all the freight cars in the fleet are not in active use all the time, the utilization ratio is always less than 100 per cent. The effect of the ratio, therefore, is to increase the *per diem* charge over what it would be if all cars were in use all the time and consequently the lower the ratio the higher the *per diem* charge. That is, a ratio of say 75% would lead to a higher *per diem* charge than a ratio of say 90%.

The Commission, to determine the appropriate car utilization ratio for calculating *per diem,* averaged actual car utilization over the past twenty years. This period included several of the depression years of the 1930's when many freight cars lay idle for want of traffic and consequently use of the twenty-year period produced a lower ratio, and a higher *per diem,* then would have been the case had a shorter period been used.

The plaintiffs argue strenuously and persuasively for the use of a shorter period than twenty years in computing average-freight car utilization. We would find it difficult, however, in view of the nature of the question and the Commission's expertness in the field, to say that the Commission committed error of law in using the twenty-year

period. But the Commission reached its conclusion in part upon an earlier decision, *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383 (1949), from which it quoted, wherein it had said at page 389: "The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10 or 15 years." We think the Commission erred insofar as it considered car-age a factor in computing car-utilization. We agree with the statement of the trial examiner who said in this connection:

> "The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average of the past 20 years. There is no reason to believe that economic cycles are so marked."

The foregoing discussion is more by way of warning to the Commission for its future guidance than a statement of the grounds for our decision annulling and setting aside the order of the Commission. Basically and fundamentally we ground the result which we reach upon the inadequacy of the Commission's consideration of the first question stated earlier in this opinion.

Per diem, as Mr. Justice Stone pointed out in his dissent in *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 112 (1931), "is admittedly but a rule of thumb." We are not fully persuaded, however, as Mr. Justice Stone suggested, that it is nonetheless "the best which experience

has devised to meet all the complex requirements growing out of the average car-hire situation." The *per diem* method may work out well enough on the average over a period of years to provide the railroads as car owners with fair compensation for the use of their cars. But there is another side to the coin, and that is the fairness of the method to the railroads as car users.

The short-haul, terminating and predominantly freight car-using railroads, by the very nature of their operation, move freight cars relatively short distances over their lines. And, as the Commission pointed out, "The average detention per car in their terminals is high." Thus on these roads, because of their short-haul terminating nature, the average freight car is subjected to relatively little mileage, and, on the other hand, is necessarily detained for unloading, and if traffic permits reloading, for a relatively long period of time in relation to its total mileage movement. On the basis of these considerations, supplemented by evidence that a study conducted in 1948 by the Engineering Section of the Commission's Bureau of Valuation disclosed that 70% of the cost of freight car repairs and 45% of the cost of freight car depreciation are directly attributable to the mileage to which a car is subjected as distinguished from the passage of time alone, the plaintiffs strenuously argue for a method of calculating car-hire which will include a mileage factor in addition to a time factor. They do not suggest going back to the early method of calculating car hire solely on the basis of the mileage travelled by each foreign car on a user's line. Nor do they suggest any sort of pure mileage basis for calculating car-hire, such, for in-

stance, as a rate calculated only on the average mileage travelled by freight cars on a user's line.

Their suggestion is that a fixed mileage factor be determined for each road based upon the average distance in miles which freight cars move per day on its lines, which it is said can easily be determined from statistics kept by the railroads and will need to be revised only when there is a substantial change in a railroad's freight traffic pattern, and that this use factor be used in conjunction with a uniform time factor for all railroads to produce a rate of car-hire fair to all railroads, both short and long-haul.

Basically this time-mileage plan involves a separation of the national aggregate car ownership cost into two categories, one consisting of that proportion of the aggregate cost directly attributable to mileage use and the other consisting of the remainder which is treated as attributable to the passage of time. Thus under the plan the *per diem* car-hire charge for a particular road is a composite figure consisting of the sum of that particular road's mileage component and the uniform national average unit cost per day attributable to time alone. It is said that the function, and the virtue, of this plan is to reallocate the aggregate ownership costs among the using railroads directly in proportion to the actual use, *i.e.* the wear and tear, incurred by cars used on each road.

The Commission gave the plan only cursory consideration. After stating its general features it said that the determination of a separate mileage use rate could not be made from the evidence before it in the case, and more-

over that "it [such determination] would involve a long and complicated statistical undertaking."[5] It then added: "If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling *per diem* accounts." Following this it briefly discussed a plan proposed by the Boston & Maine Railroad for determining a *per diem* rate based on the average age of the freight car fleet of the car-owning road, a plan no longer advocated which we need not consider, and then it said, referring to both plans:

> "As above indicated, the suggested plans for varying *per diem* charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable."

We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function.

It is true that straight *per diem* has been the basis of settlement for freight car use for over fifty years. But that does not render the straight per diem method sacrosanct. The suggested time-mileage plan on its face seems to have much to recommend it for it combines use with

[5] There is little or no specific support for this general statement in the record considered as a whole.

the passage of time as the basis for figuring a rate for car hire, and this certainly seems fairer to the short-haul terminating lines. If the evidence in this case is not sufficient to permit determination of an actual mileage use rate, the Commission can take further evidence or turn the matter over to its accounting staff for investigation and analysis. In advance of a more thorough study we do not see the basis for the Commission's broad conclusion that the plan is both impractical and undesirable. To perform our function in the face of the persuasive evidence that the plan is both desirable and feasible we must have at least some inkling of the basis for the Commission's general conclusions to the contrary. In short we think the Commission erred in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand.

We are not impressed with the argument advanced by some of the plaintiffs that the Commission should have dismissed the complaint for a declaratory judgment filed with it by the trunk line roads on the ground that in bringing it the complainants were acting in furtherance of a conspiracy unlawful under the Sherman Anti Trust Act. Indeed, we are so little impressed with the argument that we see no need either to specifically refute it or even to state it in detail.

A decree will be prepared setting aside and annulling the order of the Interstate Commerce Commission.

II. Dissenting Opinion in the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

McCARTHY, D. J. (Dissenting)

This action stems from a basic dispute between the short-line, freight terminating railroads and the car-owning freight originating railroads as to the per diem charges for each freight car while it is on the tracks of any railroad but the owner. The problem before the three judge court concerns the question of the power of the Interstate Commerce Commission to enter the order in ICC Docket No. 31358, and which is presented for review by this court together with the further question of whether or not the order entered was supported by evidence adduced before the Commission.

It is my conclusion that the Commission was without jurisdiction to enter the order in question; hence, this separate opinion in addition to the learned discussion written by Judge Woodbury.

As has been stated by Judge Woodbury the Interstate Commerce Commission entered an order which in itself

clearly indicated that it was not acting under Section 1 (14) (a) of the Interstate Commerce Act. He proceeds, however, and determines that the Commission derives authority elsewhere to enter a declaratory order as to rates. With this determination I cannot agree.

Section 5 (d) of the Administrative Procedure Act authorizes declaratory orders of the sort entered here by the Commission, but this section does not confer jurisdiction. Jurisdiction to enter this order must arise elsewhere. Section 9, Administrative Procedure Act; *Olesen* v. *Stanard,* 227 F. 2d 785. Out of deference to the rights of the parties it is the duty of the court to search the Interstate Commerce Act to determine if jurisdiction to enter an order establishing compensation for so-called per diem charges is granted under the Act separate and apart from Section 1 (14) (a).

Section 1 (4) of the Interstate Commerce Act grants compensation setting power, but this section is limited to through route cases and it is apparent from an examination of the record that the case currently before the three judge court involves more than "through route" usage and compensation.

Section 1(11) grants rule making power, but it does not refer to compensation as such. This section is analogous to Section 1 (12) which has been interpreted by the Supreme Court in *Chicago, Rock Island and Pacific Railway Co.* v. *United States,* 284 U. S. 80, as not including compensation. The language used in that case at page 99 is conclusive of the entire situation: "That subject [compensation for use of cars], as already appears, is covered by Section 1(14)(a)." This language also negatively an-

swers the suggestion that power to set compensation is impliedly in Section 1(10) or 1(11). Cf. also *Palmer* v. *United States,* 75 Fed. Supp. 63.

It is my considered judgment that, if the Commission has the power to enter an order such as this, without compliance with the requirements of Section 1(14)(a) the will of Congress has been thwarted. The obvious result of this order of the Commission is to grant to the credit balance roads unlimited power to boost per diem rates. Because of the organization of the Association of American Railroads and the voting proecdures used in setting per diem rates, the debit balance railroads, under the order entered by the Commission, are the captives of the credit-balance roads and, because of the "car service" rules and the economic facts of railroad life, they cannot buy enough freight cars to obtain enough votes to control per diem rate setting within the General Committee of the Association of American Railroads.

It may also be noted that the eastern railroads described in this petition have approximately 16,000 freight cars and these roads are all debit car railroads while the large shipping credit car railroads have cars which run into the hundreds of thousands. This becomes important in view of the fact that there is an obligation devolving upon the debit car railroads to use cars owned by the credit car railroads for shipping purposes before they can utilize their own. This is only one viewpoint of the many angles that were thoroughly disregarded by the Interstate Commerce Commission when they disregarded the recommendations of the examiner and accepted "in toto" the rates set by the American Association of Railroads.

Section 1(14)(a) is intended to negative the possibility of the issuance of any order such as we have here—an order which is, in truth, merely a rubber stamp of a decision already made by the stronger of two economic groups. Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads. The Commission in the exercise of its duties has taken the simple way out. Substance has given way to mere form.

Decision that jurisdiction may be found only within the confines of Section 1(14)(a) would obviate the possibility of the Commission surrendering its powers and duties by seeking the easy way.

Congress has spoken only twice as to per diem rates. The first was in Section 1(14)(a) which carries with it the requirement that the Commission conduct an investigation through its impartial experts. The second was in the Bulwinkle Act which authorized the organization of a private association with the approval of the Commission and which excepted rates set by this private association from the sway of the Sherman Anti-Trust law, but only so long as non-assenters were free to refuse to follow the rates set by the association and to bargain independently. The order before the Court does not set rates in accord with Section 1(14)(a) and the order before the Court does not come within the purview of the Bulwinkle Act, since the effect of the order is to require compliance with the established rates by all railroads, assenters and non-assenters alike.

It should be noted that the Congress has provided for adequate safeguards in each situation. Under Section

1(14)(a) rates may be set only after an impartial investigation conducted by a corps of experts available at all times in the personnel of the Interstate Commerce Commission; under the Bulwinkle Act the non-assenters are free to bargain independently. If the order of the Commission here should be rubber-stamped these safeguards would be lost and the clearest of anti-trust violations by illegal price fixing would be endorsed.

That part of the declaratory order here under review which states that the per diem charges were charges which could have been established under Section 1(14)(a) and that lower charges would not be compensatory is not an escape hatch which this Court can use for the following reasons.

1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. Under that section the Commission could not establish rates retroactively.

2. The fact that the Commission finds that lower rates would not be compensatory is not enough because this finding, if it is such, is not based on the impartial investigation which would have been held had the Commission acted under the said section.

I would therefore vacate the order of the Interstate Commerce Commission because it is without jurisdiction. To arrive at any other conclusion is tantamount to saying that the Commission can close one legislative gap after another. The history of the Act leads only to one conclusion and that is that these gaps cannot be closed except by the Congress of the United States.

Judgment of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 56-1004

BOSTON & MAINE RAILROAD, *et al.*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

JUDGMENT

This cause having come on to be heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order issued by the Interstate Commerce Commission, dated October 17, 1955, (petition for reconsideration, re-argument and further hearing denied July 16, 1956) in a proceeding known as *Chicago, Burlington & Quincy Railroad Company, et al* v. *New York, Susquehanna & Western Railroad Company, et al.*, I. C. C. Docket No. 31358, and the United States of America and the Interstate Commerce Commission having filed answers, and other parties having intervened, and all parties and intervenors being agreed (and the Court having found) that there is no genuine issue as to any material fact, and the Court having heard counsel, and the Court having concluded in an opinion by Judge

Woodbury that plaintiffs are entitled to judgment as a matter of law.

It is hereby ORDERED, ADJUDGED AND DECREED:

That the order issued by the Interstate Commerce Commission, dated October 17, 1955, is set aside and vacated and the cause is remanded to the Commission for further proceedings not inconsistent with the aforesaid opinion of Judge Woodbury.

That the plaintiffs shall recover their costs of $ in this Court.

Issued at Boston, Massachusetts, this 5th day of May, 1958.

s/ PETER WOODBURY

Judge of the United States Court of Appeals

s/ CHARLES E. WYZANSKI, JR.

Judge of the United States District Court

Judge of the United States District Court

APPENDIX B

Statutes Involved

Administrative Procedure Act:

DEFINITIONS

SEC. 2. [60 Stat. 237 as amended; *5 U. S. C., §1001.*] As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of

any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * *

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections

(c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

RULE MAKING

SEC. 4. [60 Stat. 238; *5 U. S. C., §1003.*] Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issue) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of

written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

SEC. 5 [60 Stat. 239; *5 U. S. C., §1004.*] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and

opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

SANCTIONS AND POWERS

SEC. 9 [60 Stat. 242; *5 U. S. C., §1008.*] In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

Interstate Commerce Act

SEC. 1, pars. 10, 11, 14(a) [40 Stat. 101 as amended; *49 U. S. C., §1(10)-(11)-(14)(a).*]

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

SEC. 5a [62 Stat. 472; *49 U. S. C.*, §*5b.*]

(1) For purposes of this section—

(A) The term "carrier" means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6)) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission, such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take

independent action either before or after any determination arrived at through such procedure.

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigat and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such

agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9).

SEC. 13(1) [24 Stat. 383 as amended; *49 U. S. C., §13(1).*]

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within

the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2) [34 Stat. 589 as amended; *49 U. S. C., §15(2).*]

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 16(1) [34 Stat. 590 as amended; *49 U. S. C., §16(1).*]

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sherman Act

SEC. 1. [26 Stat. 209 as amended; 15 U. S. C., §1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing

herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or betwen factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. [26 Stat. 209 as amended; 15 U. S. C., §2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.